A. Access to the Courts Represents a Fundamental Interested Guaranteed by the Equal Protection Clause.

The importance of access to the courts in our system of justice has been long recognized by this Court. See, e.g., *Barbier v. Connolly*, 113 U.S. 27, 31 (1884); *Chambers v. Baltimore and Ohio R.R.*, 207 U.S. 142, 148 (1907); *NAACP v. Button*, 371 U.S. 415, 429-430 (1963); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956). The foundation for the right of access to the courts was succinctly stated by the first Mr. Justice Harlan in his dissent in *Chambers, supra*:

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship. 207 U.S. at 148.

And in *Truax v. Corrigan*, 257 U.S. 312 (1921), this Court, quoting from *Barbier v. Connolly, supra*, observed that:

> The Fourteenth Amendment . . . intended . . . that they [all persons] should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts . . . 257 U.S. at 334.

Other courts also have recognized the importance of the right of access to the judicial process and extended this right to indigent litigants. See, e.g., *Jack Spring, Inc. v. Little*, 280 N.E.2d 208 (Ill. Sup. Ct. 1972); *Martin v. Superior Court*, 176 Cal. 289, 168 P. 135 (Cal. Sup. Ct. 1917); *Roberts v. Superior Court*, 264 Cal. App. 2d 282, 70 Cal Rptr. 226 (1968); *Chambers v. District Court of*

Dubuque, 152 N.W.2d 818 (Iowa Sup. Ct. 1967); *Jeffrey v. Jeffrey*, 296 N.Y.S. 2d 74, 57 Misc. 2d 416 (1969). See generally, Developments in the Law of Equal Protection, 82 Harv. L. Rev. 1065 (1969). Whether the right of access to the courts represents a fundamental interest that is protected under the doctrine of strict equal protection has not as yet been decided by this court. But, in at least one instance, the right of free access to the courts has been embraced as a fundamental interest under equal protection doctrine. *Lee v. Habib*, 424 F.2d 891 (D. C. Cir. 1970).

The appellant, however, does not rely solely upon his federal constitutional rights in asserting that his right of access to the courts represents a fundamental interest. The West Virginia Constitution accords appellant the constitutional right to appeal from a justice of the peace court to a court of record. *Richmond v. Henderson*, *supra*. (See Argument I. A., *supra*). This state constitutional right to appeal, coupled with this Court's aforementioned considerations concerning the importance of access to the judicial system, establishes appellant's right of access to the courts as a fundamental interest cognizable under the Equal Protection Clause.

The importance of appellant's interest in securing access to a court of record also stems from the inherent inequities of the West Virginia justice of the peace system. The justice of the peace forum was selected by the appellant's creditor for the manifest reason that the system practically guarantees judgment for the creditor-plaintiff. As noted previously (See Argument I. B., *supra*), the justice has a financial interest in the outcome of the litigation. He also is untrained in the law and such lack of expertise may redound to the detriment of a party, like the appellant, who asserts sophisticated legal defenses. (See Argument I. A., *supra*). By blocking

appellant's access to a court of record through the imposition of an appeal bond, he is unable to secure a fair determination on the merits of his defenses in an unbiased forum, thus he is denied a meaningful hearing.

In the recent decisions of *U.S. v. Kras, supra,* and *Ortwein v. Schwab, supra,* both of which involved an alleged monetary bar to a civil litigant's access to a court, this Court, asserting that the litigation involved the areas of economics and social welfare, did not apply strict equal protection standards and instead found a rational justification for the requirement. Neither of these cases is determinative of the issues at bar. Indeed, in *Kras*, Mr. Justice Blackmun, after discussing the applicable equal protection standard and refusing to apply the stricter test, noted that "there is no constitutional right to obtain a discharge in bankruptcy." ____ U.S. at ____, 93 S.Ct. at 638. Appellant, however, does have a constitutional right—a state constitutional right—to have his case heard before a court of record. *Richmond v. Henderson, supra.* Moreover, unlike the appellee in *Kras*, the appellant here has no alternative other than the judicial process since he must defend himself. And, unlike the appellant in *Ortwein*, the appellant here has not had the benefit of an unbiased determination of his case in the initial forum. These basic distinctions render this Court's recent rulings in *Kras* and *Ortwein* inapplicable to the instant case.

Therefore this Court should apply the more stringent compelling state interest test in determining whether the statutory double appeal bond denies appellant equal protection of the laws.

B. The Double Appeal Bond Requirement is not Reasonably Related to a Legitimate State Interest and Consequently Fails to Meet the More Stringent Compelling State Interest Test.

The more onerous double bond provision which is imposed upon an appellant from a justice of the peace court cannot be justified as being reasonably related to a valid state interest. In *Lindsey v. Normet*, 405 U.S. 56 (1972), this Court, while upholding the constitutionality of the Oregon Forcible Entry and Detainer Statute, found that a double appeal bond imposed on F.E.D. appellants was unconstitutional. Mr. Justice White writing for the majority stated:

> [A] state may properly take steps to insure that an appellant post adequate security before an appeal . . . to guard a damage award already made. . . 405 U.S. at 77.

Relying primarily upon *Lindsey*, the lower court here found that the West Virginia double bond was rationally related to its purpose of protecting the person receiving a judgment in a justice of the peace court. (Appendix at 43). In urging affirmance The Attorney General asserts that the double bond represents a "reasonable procedural provision to safeguard a monetary award." (Motion to Dismiss or Affirm at 12). Further the Attorney General argues that the bond is conditioned to satisfy the judgment in full and any costs, interest or damages for delay. (*Id.*)

Appellant, however, contends that the double bond provision is not reasonably related to the above asserted objective. The justice of the peace court appellant is required to do more than post a bond that adequately guards an existing damage award; he is required to post a

bond in *twice* the amount of the judgment against him. In condemning the double appeal bond provision in *Lindsey*, this Court held:

> . . . the double bond requirement here does not effectuate these purposes since it is unrelated to actual rent accrued or to specific damages sustained by the landlord. 405 U.S. at 77.

Likewise, the West Virginia double appeal bond provision is unrelated to the judgment or to any specific damages. Cf. *Gaines v. Hawkes, supra*. This double undertaking, an additional three hundred dollars in appellant's case, goes far beyond assuring the successful justice of the peace court litigant of his judgment and additional expenses upon appeal in the event that the appeal is unsuccessful and the additional expenses are awarded. To assert that it does is unfounded in fact and highly conjectural. There is no reason to assume that the appeal process will involve protracted litigation and ultimately result in the appellant owing twice the amount of the initial judgment. Clearly the double bond requirement does more than guard the existing damage award; it speculates, at appellant's expense, as to the outcome of the appeal and the final damage award. This does not meet the reasonableness requirement.

Contrary to the lower court's assertion, the West Virginia double appeal bond cannot be regarded as "substantially similar" to the general Oregon bond scheme which requires a bond to cover "all damages, costs and disbursements which may be awarded . . . on appeal." ORS § 19.040. (Opinion below at 11.) Unlike the Oregon provision, the West Virginia statute is not tailored to the eventual judgment award if the appeal is unsuccessful, and it is at best speculative as to the final award. It is a blanket requirement without flexibility.

The imposition of the double bond effectively penalizes the appellant. See *Lindsey v. Normet, supra*. In *Lindsey* this Court found that the Oregon double appeal bond which was forfeited to the landlord if the appeal proved unsuccessful operated as a penalty against those individuals who sought to appeal. 405 U.S. at 78-79. Here too a bond in double the amount of the judgment is required before an appeal can be taken from a justice of the peace court. If the bond cannot be posted the appeal is denied. The denial of the appeal and the attendant denial of the opportunity to be heard in a fair and impartial court of record constitutes the penalty. Furthermore, although the appellant does not ultimately forfeit his double bond, as the F.E.D. appellant did in *Lindsey*, he also is penalized by the simple fact that his initial appeal bond requirement is more onerous and requires a greater financial outlay than that faced by other appellants from courts of record. While an additional monetary outlay, which at maximum will be three hundred dollars, as in appellant's case, does not seem to be overburdensome to some, it represents a heavy financial sacrifice to many who are poor and barely can afford the necessities of life. See *U.S. v. Kras, supra*, ____U.S. at ____, 93 S.Ct. at 645 (Marshall, J., dissenting).

Undeniably the double bond requirement operates to bar the appeals of many litigants who, like the appellant, are poor and cannot post the requisite amount. This Court has consistentely ruled that classifications based on wealth are particularly objectionable and demand careful judicial scrutiny. E.g., *Edwards v. California*, 314 U.S. 160 (1041) (Jackson, J., concurring); *Douglas v. California*, 372 U.S. 353 (1963); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). And this has been widely

extended to those classifications based on wealth that burden an indigent's access to the judicial process. See *Griffin v. Illinois*, 351 U.S. 12 (1956); *Burns v. Ohio*, 360 U.S. 252 (1959); *Smith v. Bennett*, 365 U.S. 708 (1961). Cf. *Lindsey v. Normet, supra*. In *Lindsey*, this Court stated:

> The discrimination against the poor. . . is particularly obvious. For them, as a practical matter, appeal is foreclosed no matter how meritorious their case may be. . . 405 U.S. at 79. See also *Jack Spring, Inc. v. Little, supra*; *Lee v. Habib, supra*.

This is precisely the same problem that confronts the appellant here. Despite the inequities and deficiencies in the justice of the peace court, the appellant is unable to appeal his case to an unbiased court of record. And the fact that any appeal bond—whether equal to or double the amount of the judgment—will prove burdensome to the poor does not justify imposition of the heavier burden. Certainly the state of West Virginia can insure a justice of the peace court judgment by less drastic means than the double appeal bond requirement. Cf. *Shapiro v. Thompson, supra*, 394 U.S. at 637-38 (1969); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

Moreover the West Virginia appeal bond requirement is plainly overbroad and not reasonably related to the state's interest in guarding against frivolous appeals because it bars non-frivolous appeals by those who cannot afford the bond, while permitting appeals by those who can afford the bond. This is precisely the vice which this court condemned in *Lindsey*:

> The claim that the double-bond requirement operates to screen out frivolous appeals is unpersuasive, for it not only bars non-frivolous appeals by those who are unable to post the bond but also

allows meritless appeals by others who can afford the bond. . . 405 U.S. at 78.

The rationale of this Court's decision in *U.S. v. Kras, supra*, and *Ortwein v. Schwab, supra*, is not applicable to the present case. In *Kras* this Court upheld the validity of the fifty dollar bankruptcy filing fee against an equal protection attack by noting that "It [Congress] sought to make the system self-sustaining and paid for by those who use it rather than by tax revenues drawn from the public at large." ____ U.S. at ____, 93 S.Ct. at 639. In *Ortwein*, this Court ruled that a twenty-five dollar filing fee to appeal an administrative decision denying welfare assistance was valid on the grounds that the fee helped offset court operating expenses. ____ U.S. at ____, 93 S.Ct. at 1175. Unlike each of these cases, the West Virginia double appeal bond is not utilized to offset any court or administrative costs. It is only for the benefit of the judgment creditor in the justice of the peace court proceedings. Indeed the West Virginia courts have no interest in the bond that is posted.

In summary, the double appeal bond requirement imposed by the State of West Virginia on litigants seeking to appeal a justice of the peace court decision is not reasonably related to any legitimate state interest, and thus, runs afoul of the Fourteenth Amendment Equal Protection Clause.

However, appellant contends that the West Virginia double appeal bond provisions should be judged not by the reasonableness test but by the more stringent compelling state interest test. As the appellant has demonstrated he has a fundamental interest in access to the courts. Since the double appeal bond is not reasonably related to the state's interest in protecting existing judgments or precluding frivolous appeals or offsetting

judicial costs, it likewise fails under the more exacting compelling state interest standard. Nor can the double bond requirement be justified by state fiscal or administrative considerations. Such considerations are not sufficient justifications for state classifications which invidiously discriminate among classes of its citizens. *Shapiro v. Thompson, supra*, 394 U.S. at 637-38; *Shelton v. Tucker, supra*, 364 U.S. at 488. But the appeal bond is not related to any state fiscal or administrative interests; its sole function, as the Attorney General has argued, is to safeguard the judgment-creditor's damage award. And it fails in this regard even under the less exacting reasonableness test. Thus, the West Virginia double appeal bond requirement cannot be sustained by a compelling state interest, and it therefore contravenes the Equal Protection Clause of the Fourteenth Amendment and appellant's rights thereunder.

CONCLUSION

The decision of the District Court upholding the constitutionality of West Virginia's double appeal bond was erroneous, and the judgment in favor of appelles should be reversed.

Respectfully submitted

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